A

MAJLIS PERBANDARAN SUBANG JAYA v. LAGUNA DE BAY SDN BHD

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
HAMID SULTAN ABU BACKER JCA
B ABANG ISKANDAR JCA
[CIVIL APPEAL NO: B-01-162-04-2013]
25 NOVEMBER 2014

C ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers – Local authority – Function as body corporate – Renting out temporary occupation license to billboard operators – Whether local authority could enter into commercial contracts – Whether amenable to judicial review*

D ***LAND LAW:*** *Temporary occupation licence – Rights under licence, nature of – Sub-licence agreement between local authority and billboard operators – Whether TOL under sub-licence agreement same as TOL under s. 68 of National Land Code – Whether challenge on s. 68 could be taken against local authority in view of s. 9 of Local Government Act 1976 – National Land Code, ss. 5 & 65*

E ***LOCAL GOVERNMENT:*** *Town planning – Temporary occupation licence – Sub-licence agreement between local authority and billboard operators – Whether legitimised by policy and guidelines circular – Whether TOL under sub-licence agreement same as TOL under s. 68 of National Land Code – Whether challenge on s. 68 could be taken against local authority in view of s. 9 of Local Government Act 1976*

F This case concerned licensing of an outdoor advertising billboard built by the respondent on a state land. The appellant, a local authority, and the respondent was involved in erecting outdoor advertising billboards and earning an income through its clients who place the advertisement on the billboard. In August 2008, the Selangor State Government substituted the
G old scheme for licensing outdoor advertising with a new scheme by way of circulars to solve the problem of proliferation of billboards throughout the state which polluted the landscape and jeopardised the safety of road-users. Pursuant to the new scheme, the applications for temporary occupation licences ('TOL') could no longer be made by the respondent/other billboard
H operators to the Land Administrators. Instead, it would be made by the appellant to the Land Administrators and the respondent would be required to rent the land/site from the appellant. Not satisfied with the terms contained in the sub-license agreement, which purportedly contained manifest unreasonableness, the respondent sought clarification from the
I appellant, but to no avail. The appellant eventually issued a letter that the appellant would revoke its offer and evict the respondent from the site if the sub-license agreement was not signed. The respondent thus filed a judicial review application based on the decision. The trial judge allowed the application upon being satisfied that the grounds put forward by the

respondent had been made out, *ie*, that in imposing the sub-license agreement on the respondent, the appellant had acted (i) *ultra vires* its powers; (ii) illegally and/or in contravention of the law; and (iii) unreasonably, grossly disproportionately and was motivated by factors which were irrelevant. Hence, this appeal in which the appellant had limited its arguments to the issues relating to the circular and illegality relating to s. 68 of the National Land Code ('NLC'). The issues in this case involved (i) the jurisprudence relating to TOL, its terms, right to use land for specific purpose *per se* and the applicability of s. 68 of the NLC; (ii) whether s. 68 of the NLC in particular 'assignment' part will only apply to private individuals or will also be applicable to government and government agencies as well as inter related matters between the government and its agencies under its umbrella; and (iii) whether the sub-licensing agreement offered by the appellant was in breach of s. 68 of the NLC.

Held (allowing appeal; setting aside decision of High Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The Local Government Act 1976 ('the Act') gives the local authority at least two types of powers: (i) to function within the provision of the Act in matters relating to the local authority and the public. When exercising this power, it is trite that it can only act according to the laws that govern it and the decision will be subject to judicial review; and (ii) the power of a body corporate and that will be the powers vested in any corporation and has nothing to do with public rights or obligations or interest. (para 15)

(2) The public function of local authorities and its function as a body corporate must be distinguished. The function of a body corporate is not synonymous with the function of local authorities. The respondent's argument that there was no single express provision allowing the appellant to enter into the business of renting TOLs to billboard operators could not be correct. Being a separate legal entity, the appellant can enter into commercial contracts but it will be subjected to the control of the State Government and/or State Authority itself and the policy of the day. If such policy consideration relates to private contracting parties as opposed to public, then as a general rule it will not be amenable to judicial review. (para 15)

(3) Commercial contract will not fall under the jurisprudence of judicial review. For the respondent to succeed by way of judicial review, it must demonstrate, *inter alia*, that there was a violation of the fundamental rights of the citizen, breach of constitutional provision, breach of statutory provision and arbitrary exercise of power to the detriment of the public. Mere contractual disadvantage is not enough. (para 15)

(4) The 'assignment' in s. 68 is intended for the purpose of the public and has nothing to do with government bodies such as the local authority. The sub-license agreement did not say in certain terms that the appellant

had obtained TOL but that the appellant possessed the requisite legal rights in respect of the land and the respondent will be given a license to erect the billboard and not 'occupy land' as in the case of TOL granted under s. 68. The sub-license agreement was not an assignment of any rights as alleged by the respondent to attract s. 68 of the NLC. (paras 15 & 16)

(5) Section 5 of the NLC defined TOL and s. 65 of the NLC makes it clear that the State Authority can give TOL. All local authorities of the State Government come within the exclusive jurisdiction of the State Government. This means the State Government has wide powers to control the local authorities and to ensure their effectiveness and efficiency. If the State Authority's act is *ultra vires* of any law, the challenge must be against the decision of the State Authority and not the local authority. The challenge on s. 68 herein and the circular issued on the ground of *ultra vires* doctrine (if any) could not be taken against the local authorities in view of s. 9 of the Act. (para 19)

(6) There will be no prohibition for the appellant to enter into the sub-license agreement and collect whatever consideration it deemed fit and with whatever terms as a body corporate. The act of the appellant was further legitimised by the policy and guidelines circular, authorised by law pursuant to s. 9(1) of the Act and its subsequent amendment. (para 24)

(7) Section 9 of the Act must be read with s. 5 of the NLC which places State Authority in control of land matter, in particular TOL even though the issuing authority of the TOL will be Land Administrator, etc, under the umbrella of the State Authority. The lawful exercise of powers vested in the State Authority and the issuance of circular would not be *ultra vires* or illegal for the court to quash the decision on those grounds, more so, when the State Authority or State Government was not a party to the action. (para 25)

(8) The appellant had given much concession and reduced the fees and its conduct could not be stated as arbitrary or oppressive or unfair in the common sense. When dealing in commercial transactions with commercial vendors within the powers set out in s. 13, it will be a prudent exercise for the appellant to place any terms and conditions in the best interest of the public to ensure that appropriate consideration was collected from the respondent and to demand transparency of accounts to ensure that there was no default in payment by the respondent. (para 26)

(9) In essence, the court should not interfere or be slow to interfere with any commercial deals, more so, when the revenue will benefit the public unless the issue really involves the responsibility of the local authority to the public. The respondent had not made out a case for judicial review. (paras 26 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Kes ini melibatkan pelesenan papan iklan luar yang dibina oleh responden di atas tanah negeri. Perayu adalah pihak berkuasa tempatan dan responden terlibat dalam pemasangan papan iklan luar dan memperoleh pendapatan melalui pelanggan-pelanggannya yang mengiklan atas papan iklan tersebut. Dalam bulan Ogos 2008, Kerajaan Negeri Selangor menggantikan skim lama bagi pelesenan pengiklanan luar dengan skim baru melalui pekeliling-pekeliling untuk menyelesaikan masalah pertumbuhan pesat papan-papan iklan di seluruh negeri yang mencemari landskap dan membahayakan keselamatan pengguna-pengguna jalan raya. Berikutan skim baru tersebut, permohonan untuk lesen penempatan sementara ('TOL') tidak boleh lagi dibuat oleh responden/pengendali papan iklan lain kepada Pentadbir Tanah. Sebaliknya, ia akan dibuat oleh perayu kepada Pentadbir Tanah dan responden diperlukan untuk menyewa tanah/kawasan tersebut daripada perayu. Tidak berpuas hati dengan terma-terma yang terkandung dalam perjanjian sub-pelesenan, yang dikatakan tidak munasabah, responden memohon penjelasan daripada perayu, tetapi tidak berjaya. Perayu akhirnya mengeluarkan surat bahawa perayu akan membatalkan tawarannya dan menghalau responden dari kawasan tersebut jika perjanjian sub-pelesenan tidak ditandatangani. Responden, oleh itu, memfailkan permohonan semakan kehakiman berdasarkan keputusan tersebut. Hakim bicara membenarkan permohonan tersebut setelah berpuas hati bahawa alasan-alasan yang dikemukakan oleh responden telah dibuktikan, iaitu, bahawa dalam mengenakan perjanjian sub-pelesenan ke atas responden, perayu telah bertindak (i) *ultra vires* kuasanya; (ii) secara tidak sah dan/atau bertentangan dengan undang-undang; dan (iii) tidak munasabah, tidak berpatutan secara melampau dan didorong oleh faktor-faktor yang tidak relevan. Dengan itu, rayuan ini di mana perayu telah mengehadkan penghujahan-penghujahannya kepada isu-isu berkaitan dengan pekeliling dan ketaksahan berkaitan dengan s. 68 Kanun Tanah Negara ('KTN'). Isu-isu dalam kes ini melibatkan (i) jurisprudens berkaitan dengan TOL, terma-termanya, hak untuk menggunakan tanah untuk tujuan spesifik semata-mata dan pemakaian s. 68 KTN; (ii) sama ada s. 68 KTN khususnya bahagian 'penyerahan hak' hanya terpakai kepada individu perseorangan atau akan juga terpakai kepada kerajaan dan agensi-agensi kerajaan dan juga perkara-perkara yang berhubung kait antara kerajaan dan agensi-agensinya di bawah naungannya; (iii) sama ada perjanjian sub-pelesenan yang ditawarkan oleh perayu melanggar s. 68 KTN.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Akta Kerajaan Tempatan 1976 ('Akta') memberikan pihak berkuasa tempatan sekurang-kurangnya dua jenis kuasa: (i) untuk berfungsi dalam skop peruntukan Akta tersebut dalam perkara-perkara berkaitan dengan

pihak berkuasa tempatan dan orang awam. Dalam melaksanakan kuasa ini, adalah matan bahawa ia hanya boleh bertindak menurut undang-undang yang memerintahnya dan keputusan adalah tertakluk kepada semakan kehakiman dan (ii) kuasa badan korporat dan ia adalah kuasa-kuasa yang terletak dalam mana-mana perbadanan dan tidak berkait dengan hak orang awam atau kewajipan atau kepentingan.

(2) Fungsi awam pihak berkuasa tempatan dan fungsinya sebagai badan korporat mestilah dibezakan. Fungsi badan korporat tidak sinonim dengan fungsi pihak berkuasa tempatan. Hujahan responden bahawa tidak ada satu pun peruntukan langsung yang membenarkan perayu memasuki perniagaan menyewakan TOL kepada pengendali-pengendali papan iklan tidak mungkin benar. Sebagai entiti undang-undang yang berasingan, perayu boleh memasuki kontrak komersial tetapi ia tertakluk kepada kawalan Kerajaan Negeri dan/atau Pihak Berkuasa Negeri sendiri dan polisi yang berkuatkuasa. Jika pertimbangan polisi berkait dengan pihak-pihak berkontrak perseorangan, maka secara amnya ia tidak tertakluk kepada semakan kehakiman.

(3) Kontrak komersial tidak terangkum di bawah jurisprudens semakan kehakiman. Untuk responden berjaya melalui semakan kehakiman, ia perlu menunjukkan, antara lain, telah berlakunya tentangan dengan hak asasi warganegara, pelanggaran peruntukan perlembagaan, pelanggaran peruntukan statutori dan pelaksanaan kuasa yang sewenang-wenangnya memudaratkan awam. Kelemahan kontrak semata-mata adalah tidak mencukupi.

(4) 'Penyerahan hak' dalam s. 68 dihasratkan bagi tujuan awam dan tidak berkait dengan badan-badan kerajaan seperti pihak berkuasa tempatan. Perjanjian sub-pelesenan tersebut tidak menyatakan dalam terma-terma tetap bahawa perayu telah memperoleh TOL tetapi bahawa perayu mempunyai hak-hak undang-undang yang diperlukan berkaitan dengan tanah dan responden akan diberikan lesen untuk membina papan iklan dan bukan 'menduduki tanah' seperti dalam kes TOL yang diberikan di bawah s. 68. Perjanjian sub-pelesenan bukan penyerahan apa-apa hak seperti yang didakwa oleh responden bagi pemakaian s. 68 KTN.

(5) Seksyen 5 KTN mentafsirkan TOL dan s. 65 KTN menjadikannya jelas bahawa Pihak Berkuasa Negeri boleh memberikan TOL. Semua pihak berkuasa tempatan Kerajaan Negeri tertakluk di bawah bidang kuasa eksklusif Kerajaan Negeri. Ini bermaksud Kerajaan Negeri mempunyai kuasa-kuasa yang luas untuk mengawal pihak berkuasa tempatan dan untuk memastikan keberkesanan dan kecekapannya. Jika Pihak Berkuasa Negeri bertindak secara *ultra vires*, apa-apa undang-undang, cabaran perlu dibuat terhadap keputusan Pihak Berkuasa Negeri dan bukan pihak berkuasa tempatan. Cabaran terhadap s. 68 dan pekeliling yang dikeluarkan atas alasan doktrin *ultra vires* (jika ada) tidak boleh dibuat terhadap pihak berkuasa tempatan berdasarkan s. 9 Akta.

(6) Tidak ada halangan bagi perayu memasuki perjanjian sub-pelesenan dan mengutip apa-apa balasan yang dianggap sesuai dan dengan apa-apa terma sebagai badan korporat. Tindakan perayu selanjutnya disahkan oleh polisi dan pekeliling panduan, yang disahkan dari segi undang-undang menurut s. 9(1) Akta dan pindaan terkemudian.

(7) Seksyen 9 Akta perlu dibaca dengan s. 5 KTN yang meletakkan Pihak Berkuasa Negeri dalam kawalan perkara-perkara tanah, khususnya TOL walaupun pihak berkuasa yang mengeluarkan TOL adalah Pentadbir Tanah, dan lain-lain, di bawah naungan Pihak Berkuasa Negeri. Pelaksanaan kuasa yang sah diletakhakkan kepada Pihak Berkuasa Tempatan dan pengeluaran pekeliling tidak akan menjadi *ultra vires* atau tidak sah untuk mahkamah membatalkan keputusan atas alasan tersebut, lebih-lebih lagi, apabila Pihak Berkuasa Negeri atau Kerajaan Negeri bukan pihak kepada tindakan tersebut.

(8) Perayu telah memberikan banyak kelonggaran dan mengurangkan fi dan tindakannya tidak boleh dinyatakan sebagai sewenang-wenangnya atau menindas atau tidak adil dalam erti kata biasa. Apabila berurusan dalam transaksi komersial dengan penjual komersial dalam lingkungan kuasa-kuasa yang ditetapkan dalam s. 13, perayu perlu berhati-hati dalam meletakkan apa-apa terma dan syarat-syarat bagi kepentingan awam untuk memastikan balasan yang sewajarnya dikutip daripada responden dan untuk menuntut ketelusan akaun-akaun untuk memastikan bahawa tidak ada kegagalan membayar oleh responden.

(9) Hakikatnya, mahkamah tidak wajar campur tangan dalam apa-apa urusan komersial, lebih-lebih lagi, apabila hasilnya akan memberikan faedah kepada umum kecuali isu tersebut benar-benar melibatkan tanggungjawab pihak berkuasa tempatan kepada umum. Responden telah gagal membuktikan kes untuk semakan kehakiman.

Case(s) referred to:

Aluminium Company of Malaysia Berhad v. Ng Than Chai & Anor [1994] 4 CLJ 97 HC ***(refd)***

Ang Toon Chew & Sons (Malaysia) Sdn Bhd v. Wakil-wakil Diri Bagi Mohamed Taib Yusoff, Simati [1997] 2 CLJ 687 HC ***(dist)***

Ayr Harbour Trustees v. Oswald [1883] 8 App Cas 623 ***(refd)***

Baroness Wenlock & Ors v. River Dee Co [1885] 10 AC 354 ***(refd)***

Capital Billboards Sdn Bhd v. Asia Posters Sdn Bhd & Ors [2012] 1 LNS 724 HC ***(refd)***

Chong Chung Moi v. The Government of State of Sabah & Ors [2007] 5 MLJ 441 ***(refd)***

Generation Products Sdn Bhd v. Majlis Perbandaran Klang [2008] 5 CLJ 417 FC ***(refd)***

Marble Terrazzo Industries Sdn Bhd v. Anggaran Enterprise Sdn Bhd & Yang Lain [1991] 1 CLJ 109; [1991] 1 CLJ (Rep) 691 HC ***(dist)***

Murugesan v. Krishnasamy & Anor [1957] 1 LNS 44 HC ***(dist)***

Paruvathy Murugiah v. Krishnan Doraisamy [1983] 1 LNS 19 FC ***(dist)***

Penang DVPT Corp v. Teoh Eng Huat & Anor [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204 HC ***(refd)***

Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors]2014] 4 CLJ 393 CA ***(refd)***

Salomon v. A Salomon Co Ltd [1897] AC 22 ***(refd)***

Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor [2010] 9 CLJ 764 HC ***(dist)***
Vijaya Kumar Gupta v. State of Maharashtra (2008)(3) All 240 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 20
Local Government Act 1976, ss. 9(1), 13
National Land Code, ss. 5, 65, 66, 67, 68, 69

Chennai City Municipal Corporation Act 1919 [Ind], s. 4(2)
Madurai Municipal Corporation Act 1971 [Ind], s. 3(2)

Other source(s) referred to:
HWR Wade & CF Forsyth, *Administrative Law*, p 220

For the appellant - P Lathika; M/s Lathika & Assocs
For the respondent - Preetha Pillai (Vivian Siew with her); M/s Skrine

[Editor's note: For the High Court judgment, please see Laguna De Bay Sdn Bhd v. Majlis Perbandaran Subang Jaya [2013] 9 CLJ 899.]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's appeal against the decision of learned High Court Judge allowing the judicial review application in respect of the decision of the appellant to impose 25% of the gross revenue charged by the respondent to its clients for the site rental fee came up for hearing on 13 October 2014 and upon hearing able submissions by both parties, we reserved judgment. My learned brothers Balia Yusof bin Haji Wahi JCA and Abang Iskandar bin Abang Hashim JCA have read the draft judgment and approved the same. This is our judgment.

[2] The instant case is related to a rental agreement (private law) which the respondent has refused to sign on the basis that the appellant is in breach of law and has not provided favourable terms to the respondent as was done in earlier transactions. In essence, the complaint is related to a contractual licence (ie, willing licensor and willing licensee) and has nothing to do with an infringement of the right of the respondent in an administrative decision *per se* for the complaint of the respondent to be ventilated by way of judicial review. Government and/or related agencies' decision on administrative action can be a matter of challenge by the process of judicial review and not one relating to contracts, unless it is in violation of the Federal Constitution or law or public policy or colourable arbitrary exercise of power which will cause or had caused loss to the public as well as to the state exchequer, etc. The challenge must be taken by a member of the public or interested bodies and not generally by a contracting party. We will further elaborate on this

issue in this judgment. At times the distinction may be thin and a common sense approach needs to be taken to ensure a commercial vendor does not take benefit (which should rightly go for the ultimate benefit of the public) as opposed to a member of the public who needs the service of the local authority at affordable rates.

[3] There are a number of decisions to support the above proposition in India as well as in Malaysia, notwithstanding the general rule that statutory authorities and/or corporation can do only those things which it is authorised to do by statute. For example:

(a) in *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624; [2002] 2 MLJ 707, Gopal Sri Ram JCA (as he then was) had this to say:

> If the activity of the appellant in the private law sphere is called into question, e.g. the wrongful allotment or issuance of shares, the alleged wrongful removal of a director and the like, then, plainly judicial review will not lie. On the other hand, if the activity complained of falls within the public law environment, then of course judicial review will be available.

(b) in *Vijaya Kumar Gupta v. State of Maharashtra* (2008)(3) All 240, Swatanter Kumar CJ stated:

> 6.4 The scope of judicial review in public contracts or such actions of the State is limited and it is a settled rule that the judicial review will be concerned in reviewing not the merits of the decision made but the decision making process itself. If the contract by State or its instrumentalities has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into the contract. **If the court is of the opinion that public interest has been made to suffer then it would interfere in the larger interest of the public**. (emphasis added).

Jurisprudence Relating To Local Authorities And Doctrine Of *Ultra Vires*

[4] The *locus classicus* case on *ultra vires* doctrine in relation to local authorities or corporation is the case of *Baroness Wenlock & Ors v. River Dee Co* [1885] 10 AC 354, where His Lordship Lord Watson opined:

> Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

[5] His Lordship had anchored the argument based on the proposition that what the corporation may legitimately pursue must be ascertained from the Act failing which the doctrine of *ultra vires* will set in. Over the years the strict rule has been whittled down and the doctrine of *ultra vires* has also been modified in the company statutes in England, India as well as Malaysia. (See s. 20 of Companies Act 1965). In fact, the strict jurisprudence relating to *ultra vires* doctrine as enunciated in *Baroness'* case must now be seen as a ghost of the past in corporate law jurisprudence, and has limited application only to state created corporation, etc.

[6] The position in India as well as England is that the legislature had not provided extensive power to the local authorities to act as a separate legal entity and in consequence the *ultra vires* doctrine has been followed to a large extent as enunciated in *Baroness'* case and with some general exceptions when the claim is a private law or is a hybrid of private law as well as public law remedy. Learned authors HWR Wade & CF Forsyth in their book titled *'Administrative Law'* at p. 220 have this to say:

> Public authorities, like other people, frequently acquire powers by contract, for example where a local authority lets houses on lease and under the terms of the lease has power to evict the tenant or to increase the rent. Frequently the contractual power will derive from statutory power such as, taking the same example, the local authority's power to manage its housing estates, and then the rules of administrative law will apply. Where a public body's contracts are made merely in the exercise of commercial liberty, like those made by privatised industries such as electricity or gas, they fall outside administrative law since the ordinary law of contract provides adequate machinery for their enforcement and control.

[7] In Malaysia the Local Government Act 1976 ('LGA 1976') at least gives two types of powers to local authorities which will be discussed further in the judgment. And s. 13 of LGA 1976 which recognises separate legal entity principle is unique to Malaysia and is not found in England and or India when related to local authorities. In consequence the proposition in *Baroness*' case when it relates to commercial transaction of the local authority and a private party the doctrine of *ultra vires* will have no application or limited application and it all depends on the facts of the case. Court is most likely to quash the decision of local authority if it ventures into commercial transaction which exposes them to liability such as giving guarantee, etc as opposed to making use of idle land of the state and generating an income for the public benefit without any exposure of liability as in the instant case. (See *Aluminium Company of Malaysia Berhad v. Ng Than Chai & Anor* [1994] 4 CLJ 97). In abundance of caution, we must say all act of government or public and/or local authorities are always subject to judicial review and/or by way of constitutional challenge even when entering into contract. And when it relates to constitutional challenge, time may not be a factor. (See *Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors* [2014] 4 CLJ 393; [2014] 3 MLJ 661).

If the term of the contract compromises the public right or state exchequer etc.; the court is duty bound to strike down the infringing part on the grounds it will be *ultra vires* or void to exercise the powers to the detriment of the public. (See *Ayr Harbour Trustees v. Oswald* [1883] 8 App Cas 623; *Vijaya Kumar Gupta (infra)*). In consequence, even parties entering into commercial contracts such as the instant case with the government or statutory bodies or its like must be vigilant not to be a party to a term which is detrimental to the public and/or state exchequer, etc; as such contract or term is not worth the paper it is written on.

Preliminaries

[8] The learned judge had written a 30-page comprehensive judgment setting out the facts and law. It will stand as a speaking judgment. However, the judgment has failed to take into account that the issue here involves a contractual deal and not a deprivation or infringement of a right by administrative action that the respondent is entitled in law, to attract the jurisprudence relating to judicial review.

[9] This case *inter alia* involves the jurisprudence relating to temporary occupation licences ('TOL'), its terms, right to use land for specific purpose *per se* and the applicability of s. 68 of National Land Code ('NLC'). And whether s. 68 of NLC in particular 'assignment part' will only apply to private individual or will also be applicable to government and government agencies and also inter related matters between government and its agencies under its umbrella. Section 68 NLC reads as follows:

> 68. Temporary occupation licences not capable of transfer or transmission on death
>
> Except so far as it is otherwise prescribed, a temporary occupation licence shall not be capable of assignment; and every such licence shall, except as provided in section 416, terminate on the death of the person, or dissolution of the body, for the time being entitled to the benefit thereof.

[10] The case here also involves whether the sub-licensing agreement offered by the appellant is in breach of s. 68 of NLC.

Brief Facts

[11] The appellant is a local authority and the respondent is involved in erecting outdoor advertising billboard and earning an income through its clients who place the advertisement on the billboard. The case concerns the licensing of an outdoor advertising billboard built by the respondent on a state land. It must be noted that 'billboard business' is a lucrative business for the operator and these can be seen from many reported decision from the court and also news published in the public media. (See *Capital Billboards Sdn Bhd v. Asia Posters Sdn Bhd & Ors* [2012] 1 LNS 724; [2012] MLJU 385].

[12] The legal framework governing the operation of billboard business as set out by the respondent can be summarised as below:

(i) For state land Temporary Occupation Licences ('TOL') is obtained from the Land Administrator, pursuant to ss. 65 to 67.

(ii) Planning permission is then obtained from the appellant pursuant to ss. 19 to 21 of the Town and Country Planning Act 1976.

(iii) A structural permit is then obtained from the appellant, renewable every year, pursuant to the Uniform Building By-Law 1984 issued under the Street, Drainage and Building Act 1974.

(iv) An advertisement licence, renewable every year, is obtained from the appellant pursuant to the advertisement (Subang Jaya Municipal Council) By-Law 2007 issued under the Local Government Act 1976.

[13] It is not in dispute the above was the *modus operandi* of billboard business from early 2006 to 2008 between the Land Administrator, the relevant authorities and the respondent. The complaint of the respondent in essence is related to item (i) above. The complaint of the respondent before the learned judge is well articulated by learned counsel for the respondent in their submission. Much judicial time will be saved by repeating it verbatim and it reads as follows:

> 6. On 26-8-2008 the Selangor State Government issued a circular (amended on 31.3.2009) ("Circular") to its local authorities (not the respondent).
>
> 7. A reading of the circular will show that all applications for TOLs could no longer be made by the respondent/other billboard operators but would rather be made by the local authority, in this case the appellant to the Land Administrator. Billboard operators would then be required to rent the land/site from the local authority. If a billboard operator refuses to do so, the local authority would issue a notice of eviction and demolish the existing structure and offer the site to another billboard operator. The rental rate was to be at least 30% (later amended to 25%) of the revenue earned on the particular billboard.
>
> 8. The object of this new policy was ostensibly to reduce landscape pollution and accident risks caused by the proliferation of billboard, yet the Circular also made reference to the need to increase income for local authorities. What is most telling as to which object was the primary object is paragraph 3.1.4 of the Circular which states:
>
> > PBT diminta berunding dengan pemilik structure sedia ada supaya menyewa tapak struktur daripada PBT. Sekiranya pemilik struktur enggan berbuat demikian, PBT hendaklah mengeluarkan notis mengosongkan tapak atau merobohkan struktur tersebut dan tapak tersebut boleh ditawarkan kepada pengusaha papan iklan lain.
>
> 9. As far as the respondent was concerned, notwithstanding the policy, there was no change implemented for more than a year.
>
> 10. On 6.11.2009, the respondent received a letter from the appellant charging a sum of RM254,600.00 as 'Bayaran Perkongsian Tapak' for the year 2009, in addition to the annual fee of RM32,000.00 for TOL, Structural Permit and Advertising License.

11. The respondent was shocked and refused to pay. After various correspondences the appellant as to the scope and reason for these charges, the total payable amount was reduced to RM189,400.00 then to RM63,000.00 and finally to RM33,000.00. The respondent paid this final amount as it was approximate to what it was paying previously and it was also clarified that his amount included the charges for the necessary licences and permits. In a letter dated 31 December 2009, the appellant acknowledged that the reduction to RM33,000.00 was on the basis that the respondent had the necessary TOL from 2006 and 2008 and has paid all other payments due to the appellant.

12. On 9.8.2010, again after a silence of about 8 months, the appellant made an offer to the respondent, this time for tenancy of the Site ("Offer Letter") containing a different permutation. The rental to be charged was the higher of either (i) 25% of the respondent's gross annual advertising income from the Site ("25% levy") plus the TOL fee of RM3,000.00 or (ii) a fixed fee of RM33,000.00. On 19.8.2010, the respondent wrote to the appellant again on the premise that there was in substance no change to the charges being imposed on it accepted the offer and enclosed payment of RM33,000.00 for year 2010.

13. In early 2011, the appellant asked to be furnished with the respondent's contract with its customers to determine if RM33,000.00 or 25% levy was applicable. The respondent replied by letter stating that it would pay whatever was prescribed by law and enclosed payment of RM33,000.00 which the appellant accepted on 16.2.2011.

14. However, 6 months later the appellant issued a letter directing the respondent to attend at the appellant's office within 14 days for the purpose of entering into an agreement with the appellant. The agreement was not provided and only upon respondent's request did the respondent subsequently receive a draft copy of what was described as Billboard Site(s) Sub-Licence Agreement ("Sub-Licence Agreement") which provided for the imposition of 25% levy plus the TOL fee or RM33,000.00, whichever is higher.

15. The Sub-Licence Agreement also contained other terms which were illogical, unfair, prejudicial to the respondent, where the appellant conferred upon itself the rights *inter alia* to have a say in the respondent's company shareholding. Clause 8 provides that as long as the Sub-Licence Agreement is in subsistence, the respondent must obtain the appellant's consent before changing its ownership structure and shareholding; Clause 4.3 requires the respondent to deliver up its management accounts, balance sheets, profit and loss statements; Clause 4.4 allows for variation, review and increase of fees at the absolute discretion of the appellant; Clause 6.1(a) requires the respondent to undertake to pay its taxes. Noteworthy is also Clause 25 which states that the relationship is not a partnership or Joint Venture in stark contradiction to the 2009 position of "perkongsian tapak".

16. Given the manifest unreasonableness of the Sub-Licence Agreement, the respondent tried to seek clarifications from the appellant on the terms but to no avail.

17. Eventually the appellant issued a letter dated 01.12.2011 warning that the appellant would revoke its offer and evict the respondent from the Site if the Sub-Licence Agreement was not signed. The respondent in fact filed a Judicial Review application based on this decision but at the leave stage the Attorney General's office objected to it on the grounds that it was premature as the final decision was that communicated on 26.4.2012 where the appellant wrote to withdraw the offer with immediate effect and the respondent was given an ultimatum of 30 days to remove its billboard structure because of the respondent's failure to execute the Sub-Licence Agreement.

18. The learned Judge was satisfied that the three grounds put forward by the respondent had been made out, namely that in imposing the Sub-Licence Agreement on the respondent, the appellant:

(i) Had acted *ultra vires* its powers;

(ii) Had acted illegally and/or in contravention of the law;

(iii) Had acted unreasonably, grossly disproportionately and was motivated by factors which are irrelevant.

19. For reasons to be set out below, we submit that the learned Judge had come to the right decision in allowing the respondent's application for judicial review and we respectfully invite this Honourable Court to dismiss the present appeal by the appellant.

[14] The appellant has filed a lengthy memorandum of appeal even though at the opening of the submission they have limited their arguments to the issues relating to the circular and illegality relating to s. 68 NLC. For purpose of deliberation, we have taken the liberty to reproduce the relevant parts of the memorandum of appeal verbatim. The complaint in the memorandum of appeal reads as follows:

1. The learned Judge erred in law and fact in allowing the respondent's application for judicial review, and in particular in:

(i) Declaring that any Sub-License Agreement in the terms of the Billboard Site(s) Sub-Licence Agreement ('Sub-Licence Agreement') would be invalid and *void ab inito*.

(ii) Declaring that the appellant did not have the capacity to enter into a contract in terms of the Sub-Licence Agreement.

(iii) Declaring that the appellant was not entitled to use the contractual mechanism or any mechanism which involved the sharing of the respondent's income as a basis for the grant of any license/consent/approval to the respondent to enable the respondent to carry out or continue outdoor advertising business at the Site upon the reserve land adjacent to the Hindu temple at Lot 6215, Persimpangan Persiaran Kewajipan and the Shah Alam Highway, Subang Jaya, Mukim Damansara, Daerah Petaling, Selangor ('Site').

(iv) Declaring that the respondent was not entitled to enter into any Sub-Licence Agreement with the respondent which contained terms which were the same or materially the same as those

contained in the Sub-Licence Agreement, in particular but not limited to the terms in clauses 3.5(b) & (c), 4.3, 4.4, 6.1(a), (b) & (k), 8 and 23.1 thereof ('Disputed Clauses'); and

(v) Granting a *mandamus* to compel the appellant to take the necessary steps to allow the respondent to continue its outdoor advertising by means of its billboard at the Site for 2012 and the following years on the same terms or materially the same terms as those in 2007 to 2011.

2. The Learned Judge erred in law and in fact in failing to hold that as the respondent had neither initiated any proceedings to challenge the Circular of the Selangor State Secretary (Local Authorities Section) which outlined the Policy and Guidelines for the Construction of Billboards for Local Authorities in the State of Selangor dated 26.08.2008 and the Circular of the Selangor State Secretary (Local Authorities Section) dated 31.03.2009 ('Circulars'), nor named the Selangor State Government as a party to the proceedings below, it was barred from questioning their legality and effect.

3. The Learned Judge erred in law and fact in failing to consider the following facts:

(i) The judicial review proceedings and the relief claimed by the respondent were expressly and specifically confined to the Sub-Licence Agreement which was entered into between the appellant and respondent pursuant to the Circulars.

(ii) Even if the respondent had challenged the Circulars in separate proceedings (which it had failed to do), the court was not likely to have attempted to form an opinion on their soundness or legality.

(iii) The Selangor State Government substituted the old scheme for licensing outdoor advertising ('Old Scheme') with a new scheme ('New Scheme') by way of the Circulars to solve the problem of the proliferation of billboards, (many of them illegal) throughout the state which polluted the landscape and jeopardized the safety of road-users. After carrying out a study of the problem, the state decided that the most efficient and fairest mechanism of licensing was to require the local authorities (instead of the advertisers) to obtain the temporary occupation license ('TOL') for the billboards sites and permit the advertisers to use the sites for fees representing a reasonable proportion of the income derived by the advertisers from the use of the sites, and then use such collected fees towards its revenue for the public good.

(iv) Whereas the local authority can in theory increase its income from its licensing of outdoor advertising activity under the New Scheme, the facts show that the appellant did not follow the Circulars to the letter but instead continued to consider applications for the relevant approvals and licenses with its discretionary powers intact and unfettered.

(v) By the respondent's own calculation, the total fee payable yearly under the Old Scheme was approximately RM32,500.00 whereas the fee paid by the respondent under the New Scheme for the years 2009, 2010 and 2011 was RM33,000.00 for each year and hence the respondent did not suffer any disadvantage under the New Scheme.

(vi) If the new policy raised questions of legality and even ethics, given the complete absence of evidence on such issues, the court was not equipped to answer them and such questions could only be answered in separate proceedings against the Selangor State Government.

(vii) The Circulars constitute administrative quasi-legislation which is directly addressed to the local authorities in Selangor, including the Appellant and therefore bind the Appellant local authority.

(viii) The Circulars amount to directions issued by the Selangor State Government pursuant to section 9 of the Local Government Act 1976 which the Appellant is duty-bound to observe.

(ix) No evidence was adduced by the Respondent to show that the Circulars were *ultra vires* the powers conferred on the Selangor State Government; unreasonable; or illegal.

4. The Learned Judge erred in law and fact in holding that the imposition of the Sub-Licence Agreement by the Appellant on the Respondent was *ultra vires* when the power to do so is expressly conferred or derived by reasonable implication from the provisions of the Local Government Act 1976, in particular sections 9, 13, 36, 39 and 101(s) and (ff) thereof, or the same may be regarded as having been carried out pursuant to powers incidental to or consequential upon the powers expressly stated therein.

5. The Learned Judge erred in law and fact in holding that the imposition by the Appellant of an annual sub-licence fee of 25% of the gross annual income of the Respondent (together with the TOL fee of RM3,000.00) or the sum of RM33,000.00, whichever is the higher, is not a permitted revenue under the Local Government Act 1976.

6. The Learned Judge erred in law and fact in finding that the insertion by the Appellant of clauses 8, 4.3, and 6.1 (a) & (b) in the Sub-Licence Agreement was not within the terms of its powers under the Local Government Act 1976 or any by-laws and that such powers were not within the bounds of its statutory purpose or within the contemplation of its statutory powers.

7. The Learned Judge erred in law and fact in failing to hold that any contract which the Appellant enters into with the Respondent must contain terms which ensure that: the public interest is at all times secured; the Appellant's discretionary powers are not contracted away; and the Appellant is able to determine the full fees that are payable by the Respondent, and further the Learned Judge erred in failing to hold that the Disputed Clauses are consistent with the aforesaid purpose.

8. The Learned Judge erred in law and fact in holding that the right being licensed out by the Appellant to the Respondent is the right to occupy the Site and the Sub-Licence Agreement is in fact an arrangement to circumvent section 68 of the National Land Code; that the Respondent has acted *ultra vires* its powers; and that the Sub-Licence Agreement is therefore illegal, null and void.

9. The Learned Judge erred in law and fact in failing to consider that:

   (i) the Federal Court in *Paruvathy d/o Murugiah v. Krishnan s/o Doraisamy* [1983] 2 MLJ 121 has clearly used the words "assignment" and "transfer" interchangeably and the prohibition in section 68 of the National Land Code would only come into play in the case of an outright sale or transfer or assignment of the Appellant's TOL to the Respondent; and

   (ii) in this case, the "permission" to use the Site is restricted to the activities outlined in Clause 3.1 (a) to (e) of the Sub-Licence Agreement i.e. the Respondent was only allowed to enter the Site and install and maintain the billboard and there was no outright sale or transfer or assignment of the TOL.

10. The Learned Judge erred in law and fact in failing to hold that the Appellant's Letter of Offer dated 9.8.2010 and the Respondent's Letter of Acceptance dated 19.8.2010 constituted a contract ("Contract") made between the aforesaid parties on the terms and conditions set out in the Appellant's Letter of Offer dated 9.8.2010.

11. The Learned Judge erred in law and fact in failing to give any or any due consideration to the fact that:

   (i) the Respondent's failure to obtain Planning Permission and the Structural Permit and Advertising Licence amounted to a breach of the condition in paragraph 2.7 of the Appellant's Letter of Offer dated 9.8.2010; and the failure to sign the formal Sub-Licence Agreement amounted to a further breach, in particular, paragraph 213 of the said Letter of Offer; and

   (ii) the Appellant's decision to terminate the Sub-Licence Agreement by its Letter of Termination dated 26.4.2012 was lawful, reasonable and fair in view of the Respondent's failure to obtain the said necessary approvals and license and failure to execute the formal Sub-Licence Agreement, both of which amounted to a breach of the Contract.

12. The Learned Judge erred in law and fact in failing to hold that the decision of the Respondent to exercise its contractual right to terminate the Contract by way of the Letter of Termination dated 26.4.2012 pursuant to the breach of the terms of the Contract by the Applicant, is not an administrative decision which is amenable to judicial review.

13. The Learned Judge erred in law and fact in failing to hold that the Disputed Clauses are valid for the following reasons:

A (i) Both parties had already entered into a concluded agreement as evidenced by and contained in the Appellant's Letter of Offer dated 9.8.2010 and the Respondent's Letter of Acceptance dated 19.08.2010.

(ii) The Disputed Clauses correspond with the terms of the
B Appellant's Letter of Offer dated 9.8.2010 which had already been accepted by the Respondent.

(iii) The Disputed Clauses do not contain terms which are unreasonable, unfair or unduly favourable to the Appellant and in fact are necessary to enable the Appellant to implement the New Scheme as contemplated by the Circulars.

C

Wherefore the Appellant prays that its appeal herein be allowed with costs and for such other orders as ought to be made in the interests of justice.

[15] We have read the appeal record and the submissions of the parties in detail. We take the view the appeal should be allowed. Our reasons *inter alia*
D are as follows:

(a) The LGA 1976 gives the local authority at least two types of powers. One to function within the provision of the Act in matters relating to the local authority and the public. When exercising this power it is trite that it can only act according to the laws that govern it and the decision will
E be subject to judicial review. (See *Generation Products Sdn Bhd v. Majlis Perbandaran Klang* [2008] 5 CLJ 417; [2008] 6 MLJ 325). This power and its limits was articulated by Edgar Joseph Jr J (as he then was) in *Penang DVPT Corp v. Teoh Eng Huat & Anor* [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204; [1992] 1 MLJ 749:

F

> Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorized to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are *ultra vires*. There must in all cases be statutory authority for what is done, and
G that authority must either by expressly given or reasonably inferred from the language of an Act of Parliament.

(b) The other power given under s. 13 of the LGA 1976 to local authorities is the power of a body corporate and that will be the powers vested in any corporation and has nothing to do with public rights or obligations
H or interest. This section was not addressed in the *Penang Development Corporation's* case *(supra)* and in consequence the case has limited application to the facts of the instant case though the court acknowledged that Parliament can give such powers to local authority. As a general rule, a body corporate, if separate legal entity principles apply, can enter
I into any form of transaction with private parties on such terms and conditions, etc. And such matters if it is a state corporation will usually be a policy matter in relation to state authority or local authority by the State Government, etc. Such powers exercised as body corporate cannot

be challenged by way of judicial review (except for reasons stated in the early part of the judgment). This can be 'expressly or reasonably inferred' in s. 13 of LGA which gives the powers of separate legal entity principle in line with the principles enumerated in *Salomon v. A Salomon Co Ltd* [1897] AC 22. The said section reads as follows:

> 13. Every local authority shall be a body corporate and shall have perpetual succession and a common seal, which may be altered from time to time, and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform.

(c) Section 13 as said earlier is unique to Malaysia. For example, s. 4(2) of Chennai City Municipal Corporation Act 1919, restricts the separate legal entity principle. That s. 4(2) reads as follows:

> 4(2) The Corporation shall be a body corporate with the name aforesaid having perpetual succession and a common seal with power, **subject to the provisions of this Act**, to acquire, hold and dispose of property and may by the said name sue and be sued. (emphasis added)

Another example, in s. 3(2) of Madurai Municipal Corporation Act 1971 reads as follows:

> 3(2) The Corporation shall by the said name be a body corporate, shall have perpetual succession and a common seal and **subject to any restrictions or qualifications imposed by this Act or any other enactment**, shall be vested with the capacity of suing or being sued in its corporate name, of acquiring holding or transferring property movable or immovable, of entering into contracts and of doing all things necessary for the purpose of its constitution. (emphasis added)

(d) Both the municipal corporations are situated in Tamil Nadu and the legislature had deemed it fit to give different definitions to powers of the corporation. In essence, the *ultra vires* doctrine enunciated in *Baroness*' case will apply in the Indian jurisdiction with certain exceptions created by case laws as stated earlier. Our s. 13 LGA 1976 gives much wider powers. The distinction is like apple and orange in contrast to the position in England and India taking into consideration that Parliament does not enact anything in vain.

(e) The public function of local authorities and its function as a body corporate (legal entity) must be distinguished. The function of a body corporate is not synonymous with the function of local authorities. The respondent's argument that there is no single express provision allowing the appellant to enter into the business of renting TOLs to billboard operators cannot be correct. Being a separate legal entity, they can enter into commercial contracts but it will be subject to the control of the State Government and/or State Authority itself and the policy of the day. If

such policy consideration relates to private contracting parties as opposed to public then as a general rule it will not be amenable to judicial review.

(f) It is well established that judicial review of administrative actions is permissible on the ground of illegality or irrationality or procedural impropriety. (See *Chong Chung Moi @ Christine Chong v. The Government of State of Sabah & Ors* [2007] 5 MLJ 441). Commercial contracts will not fall under the jurisprudence of judicial review. Further, administrative decision involving policy decision has been put on a different pedestal. The learned authors of *Judicial Power or Judicial Review* [2012] at p. 664 on this issues states:

> Though they are not totally immune from judicial review, yet certain grounds which are available in the case of administrative decisions not involving policy considerations are not open for challenging the policy decisions. Since courts do not sit as an appellate authority over the policy considerations, it cannot see correctness, suitability and appropriateness of the policies.
>
> In *Directorate of Film Festivals v. Gaurav Ashwin Jain* AIR (2007) SC 1640, the Supreme Court pointed out that the court cannot interfere with the policy either on the ground that it is erroneous or that a better and fairer alternative is available. The executive has authority to formulate the policy and the court can interfere with it only if it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution or opposed to a statutory provision. [See *Jitendra Kumar v. State of Haryana* (2008) 2 SCC 161].

(g) For the respondent to succeed by way of judicial review, it must demonstrate *inter alia* at least one of the following: (i) it violates the fundamental rights of the citizen; (ii) breach of constitutional provision; (iii) breach of statutory provision; (iv) arbitrary exercise of power to the detriment of public, etc. Mere contractual disadvantage is not enough.

(h) On the issue of illegality, the complaint of the respondent is sub-licensing agreement relates to TOL and s. 68 does not permit the TOL holder to assign the right for a rent. And the respondent before the learned judge had relied on the following cases: (i) *Paruvathy Murugiah v. Krishnan Doraisamy* [1983] 1 LNS 19; [1983] 2 MLJ 121; (ii) *United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor* [2010] 9 CLJ 764; [2010] 7 MLJ 293; (iii) *Ang Toon Chew & Sons (Malaysia) Sdn Bhd v. Wakil-wakil Diri Bagi Mohamed Taib Yusoff, Simati* [1997] 2 CLJ 687; [1998] 5 MLJ 481; (iv) *Marble Terrazzo Industries Sdn Bhd v. Anggaran Enterprise Sdn Bhd & Yang Lain* [1991] 1 CLJ 109; [1991] 1 CLJ (Rep) 691; [1991] 1 MLJ 253; (v) *Murugesan v. Krishnasamy & Anor* [1957] 1 LNS 44; [1958] 1 MLJ 92. What is important to note is that all these cases have nothing to do with the State Authority or local authority. Further, in our view 'assignment' in s. 68 is intended for the purpose of the public and has nothing to do with government bodies such as the

local authority. The parties have not furnished to us any cases that s. 68 assignment will be applicable also to local authority. On this issue, learned judge had concluded as follows:

> In all the circumstances aforesaid, the court is satisfied that the right being licensed out by the respondent to the applicant is the right to occupy the Billboard Site - the land over which the licence under the TOL is issued. The Sub-Licence Agreement is in fact an arrangement to circumvent s. 68 NLC which prohibits the assignment or transfer of the TOL to any third party.
>
> In consequence, the respondent had acted *ultra vires* its powers when it sought to impose the Sub-Licence Agreement on the applicant. Further, for being in express contravention of s.68 NLC, the purported assignment of the TOL under Sub-Licence Agreement is illegal, null and void.
>
> By reason of the aforesaid can it be said that the respondent had improperly exercised its discretionary powers. This question can be answered by reference to background facts set out earlier. When previously the fees charges for the billboard were about RM33,000.00, the new fees sought to be imposed comes close a quarter million. The terms in the Sub-Licence Agreement relating to the control of the applicant's shareholding, delivery of audited accounts and undertaking to pay taxes, are with respect rather arbitrary and not within the scope or contemplation of the respondent's powers under the LGA and bye laws. It is also pertinent to consider the fact that the applicant had been occupying the 'Billboard Site' since 2007 and has invested substantial sums in obtaining the necessary approvals, licences and permits including the construction of the billboard structure. What the respondent sought to do under the Sub-Licence Agreement was an entirely different and distinct scheme altogether; it sought in one breath to disenfranchise the applicant as the TOL holder to its right to apply for a renewal of its TOL; instead, the local authority would be issued the TOL. The respondent would then sub-licence the TOL to the applicant and charge a 25% fee on the gross revenue. This scheme does not appear to be contemplated within the LGA or by laws. It is also illegal for being in contravention of s. 68 NLC.

[16] We have read the sub-licence agreement several times. The recitals 1.1 do not say in certain terms that the appellant had obtained TOL but what is clear is that the appellant possess the requisite legal rights in respect of the land and the respondent will be given a licence to erect the billboard and not 'occupy land' (at the exclusion of others) as in the case of TOL is granted under s. 68. The sub-licence agreement is not an assignment of any rights as alleged by the respondent to attract s. 68 of NLC. The recital 1.1 of the agreement says as follows:

> MPSJ has obtained or is in the process of obtaining a temporary occupation licence ('TOL') and/or possess the requisite legal rights in respect of all that piece/all those pieces of land more particularly described

A in Section 3(a) of the First Schedule hereto (collectively, "Billboard Site(s)"). The list of the Billboard Site(s) and a copy of the Pre-Com Plan(s) is/are annexed hereto as "Annexure A".

[17] As we stated earlier, a sub-licence in the instant case has nothing to do with s. 68 relating to assignment for the court to invoke s. 68 of NLC and B say it was 'illegal'. The definition of sub-licence in the agreement reads as follows:

> "Sub-Licence" means the permission granted by MPSJ to the Sub-Licensee pursuant to Clause 3.0 of this Agreement for the sole purpose of displaying Billboards and is revocable at any time by MPSJ without C prior notice and the Sub-Licensee has no legal redress for such revocation.

[18] TOL mentioned in the sub-licensing agreement cannot be equated to TOL under s. 68 of NLC as the definition is precarious in that it does not say in uncertain terms the appellant has obtained a TOL and is assigning the TOL to the respondent. The definition of TOL under the Sub-Licence D Agreement is defined as follows:

> "TOL" means the temporary occupation licence which MPSJ has obtained or is in the process of obtaining.

[19] This definition is not the same as the definition of TOL in the National E Land Code. Temporary Occupation Licence is defined under s. 5 of the NLC and means a licence issued under Chapter 2 of Part Four of the NLC which relates to ss. 65 to 69 of the NLC. Section 65 makes it clear that the State Authority can give TOL. And State Authority means under the definition the 'Ruler or Governor of the State'. It is trite the executive head of the State Government is the 'Ruler or Governor of the State' as the case may be. (See F the Constitution of Selangor 1959). All local authorities of the State Government come within the exclusive jurisdiction of the State Government. This means State Government has wide powers to control the local authorities and to ensure their effectiveness and efficiency. In article titled '*Introduction to Local Government in Malaysia*', the author Dilly M Hill G (1974) observes:

> In Malaysian context, report by Royal Commission of Inquiry stated that local government could see as below:
>
> (a) Representing the third tier in federal structure
>
> H (b) Administered by state nominated councillors
>
> (c) Geographically encompassing a portion of the country
>
> (d) It is infra - sovereign
>
> (e) Subordinate and subject to the control of the state (limited of financial and administration issues
>
> I (f) It is a separate legal unit/entity from higher government or other local authorities.
>
> (g) Has power to sue and be sued
>
> (h) Provide obligatory and discretionary to provide goods and services.

1.2 Concept of local government

I. Local Government is responsible on the local affairs just like what the state and federal government had set.

II. The status of the Local Government is much lower than the state and federal government.

III. The Local Government autonomy in administering aspect is set by the state and federal government.

IV. The Local Government has the power to sue or be sued, to sign or agree on contracts and to gain properties.

V. It is responsible to give service to the public that lives in the area that is set by the federal and state government.

1.3 Features/characteristics of local government

According to Phang Siew Nooi, there are a few factors that has been determined the characteristics of local government in Malaysia which can be seen as follows:

1. Local Government has its own territory whereby the border is officially recognized by the law. Law divides it equally.

2. Local Government has its own population. L.G is responsible to develop the area for the benefits of the locals in that area. e.g. In term of facilities/infra-structure.

3. Local Government is an institution, which is established under special law. Superior government controls it.

4. Local Government carried out their function by following the law provided they can be sued, can sue, have properties, and can signed - agreement or contract.

5. It is infra-sovereign. It means that Local Government is eligible to the local law. e.g. - limited power and duty; - No supreme.

6. It is a separate legal entity. It means that although it is part of government but still an independent body.

7. Representatives are either appointed by the higher authority or elected by the local people.

8. Yang Di Pertua (YDP) works together with council member and was elected by the State Government.

9. Carries out main functions such as cleanliness services, health services and security.

10. Local Government powers are to impose tax, penalty to those who disobey their order, appoint their staff, and autonomy in terms of financial administration of its body.

[20] Local governments are usually referred to as Majlis and the appellant is a local government and is subject to LGA 1976 as per the interpretation Act 1948 and 1967. "Local authority" means any municipal council, town council, town board, local council, rural board, sanitary board or similar local authority established by a written law.

[21] What is important to note in our case in respect of *ultra vires* doctrine is the power of the State Authority to control the local authorities, in this case the appellant. If the State Authority act is *ultra vires* any of the law, the challenge must be against the decision of the State Authority and not the local authority. In the instant case, the challenge on s. 68 and the circular issued on the ground of *ultra vires* doctrine (if any) cannot be taken against the local authorities in view of s. 9 of LGA 1976.

[22] In addition, clause 3.0 of Sub-Licensee Agreement is only a restricted right of user and it reads as follows:

> ... which permission is restricted to the right to:
>
> (a) enter the Billboard Site(s) at the Sub-Licensee's risk;
>
> (b) construct, finance, complete and equip the Billboard Site(s) at the Sub-Licensee's own cost and expense;
>
> (c) carry out the Works at the Billboard Site(s), subject to the provisions of this Agreement;
>
> (d) administer, operate, manage, utilize and maintain the Billboard Site(s); and
>
> (e) enter into a contract or arrangement with any third party to enable the Sub-Licensee to levy, collect and retain for its own benefit income derived from the Billboard Site(s), subject always to payment of MPSJ's Entitlement to MPSJ.

[23] It is difficult even to fathom how the restricted right of user even in the event the TOL had been given to the appellant will amount to a transfer or assignment under s. 68 for the respondent to argue that the terms of the sub-licence agreement is in breach of s. 68 and sustain the ground of illegality to quash the decision. (See *Paruvathy Murugiah v. Krishnan Doraisamy* [1983] 1 LNS 19; [1983] 2 MLJ 121). In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, Chang Min Tat CJ had this to say:

> The transaction merely involved the taking over by one contractor from another contractor of contract works for and with the consent of Sugut Enterprise Co Sdn Bhd. A TOL is not the same as a timber licence as the former is issued by the Land Office under the provisions of the Sabah Land Ordinance. It is difficult to see how the transaction between two contractors not involving any transfer of rights under a timber licence could be said to be illegal. Appellant tried all he could to get the Assistant Collector of Land Revenue to grant a T.O.L. to respondents. Until the TOL was cancelled, respondents had been using the road and houses under it. Although the TOL is not transferable the statute does not prohibit letting of a house built on land held under a TOL The letting on rent does not amount to a transfer of a licence and is not illegal. In *Govindaraju v. K*rishnan [1962] MLJ 334 and *Ban Seng v. Yap Pek Soo* [1967] 2 MLJ 156 appellant never transferred the TOL to respondent. All the appellant did was to permit respondent to use his rights under that TOL There was nothing illegal about such an arrangement.

And in the same case, Lee Hun Hoe CJ (Borneo) had this to say: A

> ... But there is a difference between the transfer of the rights contained in a licence and permitting the use of it. Thus a monthly letting of two rooms in a house built on state land under a TOL which was not transferable, is not prohibited by statute or made illegal by the non-transferable provision: per Ismail Khan J. (as he then was) in *Govindaraju v. Krishnan* [1962] MLJ 334 at page 335, followed in *Ban Seng v. Yap Pek Soo* [1967] 2 MLJ 156. B
>
> In my view and with respect, the contention of the appellant that what Clause 9 says was that the appellant shall permit the respondent "to take over and use" the road within the TOL issued by it, and that this was not a transfer of rights but a permit to use and therefore not illegal as against the non-transferability provision is correct. C

[24] In our considered view, there will be no prohibition for the appellant to enter into the sub-licence agreement and collect whatever consideration it deems fit and with whatever terms as a body corporate. The act of the appellant is further legitimised by the policy and guidelines circular dated 26 August 2008 and its subsequent amendment. The said circular is authorised by law pursuant to s. 9(1) of LGA 1976 which reads as follows: D

> 9. (1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions. E

[25] Section 9 of the LGA 1976 must be read with s. 5 of the National Land Code, which places State Authority in control of land matter, in particular TOL even though the issuing authority of the TOL will be Land Administrator, etc, under the umbrella of the State Authority. We do not see how the lawful exercise of powers vested in the State Authority and the issuance of circular will be *ultra vires* or illegal for the court to quash the decision on those grounds, more so when the State Authority or State Government is not a party to the action. The submission of the appellant on this issue has merits. And that part of the submission *inter alia* reads as follows: F G

> Even if the respondent company were to challenge the Circulars in separate proceedings, the court is not likely to attempt an opinion on its soundness or legality, if that is what is being challenge by the respondent company. H
>
> In *Gillick v. West Norfolk AHA* [1996] 1 AC 112, the House of Lords upheld a memorandum of guidance on family planning services which contained a section dealing with contraceptive advice and treatment for young people. The court held that in cases where any proposition of law implicit in a departmental advisory is interwoven with questions of social and I

A ethical controversy, the court should exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing *ex cathedra* opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision.

B

[26] We do not see why the payment for the user of the licence by a commercial vendor for commercial purpose need to be restricted in any manner as it should be rightly determined by market forces. In the instant case, we also note that the appellant had given much concession and reduced the fees and the conduct of the appellant cannot on the facts be stated as C arbitrary or oppressive or unfair in the common sense. The respondent has not furnished us any authorities by commercial user for commercial purpose of state land where the consideration and terms were arbitrary or disproportionate and stood as a ground for challenge by way of judicial review. In addition, we must say that when dealing in commercial D transaction with commercial vendor within the powers set out in s. 13 it will be a prudent exercise for the appellant to place any terms and conditions in the best interest of the public to ensure that appropriate consideration is collected from the respondent and to demand transparency of accounts, etc (which the respondent complains) to ensure that there is no default in E payment by respondent. In essence, court should not interfere or be slow to interfere with any commercial deals more so when the revenue will benefit the public unless the issue really involves the responsibility of the local authority to the public.

[27] We are of the considered view notwithstanding the well reasoned and F speaking judgment of the learned trial judge, the respondent has not made out a case for judicial review on the grounds that the terms imposed by the appellant in the sub-licensing agreement are:

(i) *ultra vires* its powers;

G (ii) an agreement that is illegal and/or in contravention of the law;

(iii) acting unreasonably, grossly disproportionate and motivated by factors which are irrelevant.

[28] For reasons stated above, the appeal is allowed. The judgment of the H High Court is set aside, with costs here and below.

We hereby order so.

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